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June 12, 2006

Jeff S. Jordan
Supervisory Attorney
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5732: Matt Brown for U.S. Senate and James Vincent as Treasurer

Dear Mr. Jordan:

I am responding on behalf of respondents Matt Brown for U.S. Senate and James Vincent, its Treasurer, in his official capacity (see FEC, "Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings," 70 Fed. Reg. 3 (Jan. 3, 2005)) (collectively, "the Brown Committee"), to the complaint filed in this matter. On the basis of both our showing and those of the other respondents, the Commission should conclude that there is no reason to believe that the Brown Committee violated the Federal Election Campaign Act ("the Act") and it should close the file in this matter.

Factual Background

The complaint was filed on April 17, 2006, by the state Republican Party committees of Rhode Island and Hawaii, entities that were politically adverse to the Brown Committee. The complaint is "based upon recent newspaper articles and information and belief," Complaint at 1; in fact, the complaint relies exclusively upon the (excerpted) articles and it contains no independent information, let alone first-hand knowledge of the complainants.[1]

The complaint alleges that the Brown Committee and the other respondents violated the Act's proscriptions against earmarked contributions, 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.6, or, alternatively, the regulatory proscription against contributing to a political committee with knowledge that a substantial portion of one's contribution will be contributed to a candidate to whom the contributor has also contributed. 11 C.F.R. § 110.1(h). See Complaint at 2.

The specific contributions and other transactions alleged in the complaint are the following. As reported on their respective Year-End Reports filed with the Commission, on December 30, 2005, the Democratic Party of Hawaii ("Hawaii Party") contributed $5,000 to the

[1] We note that, as served upon the Brown Committee, the complaint includes none of the exhibits it references except for Exhibit A, the newspaper articles.

Brown Committee; on December 31 the Maine Democratic State Committee ("Maine Party") contributed $10,000 to the Brown Committee ($5,000 to its primary election account and $5,000 to its general election account), and on December 29, 2005, the Massachusetts Democratic State Committee ("Massachusetts Party") contributed $10,000 to the Brown Committee (also $5,000 to the primary election account and $5,000 to the general election account).

As indicated either on reports filed with the Commission, on reports filed with state election authorities or in other respondents' submissions, the following contributions to these three state party committees were made by individuals identified in the complaint who had previously contributed to the Brown Committee. In November 2005, John Connors contributed $10,000 to the federal account of the Massachusetts Party, and in early January 2006 Richard Bready contributed $6,000 to the federal account of the Hawaii Party, $6,000 to the non-federal account of the Maine Party, and $5,000 to the federal account of the Massachusetts Party. Additionally, although not alleged in the complaint, as indicated by the same sources described above, two other previous Brown Committee contributors also contributed to one of these state party committees: in mid-January David Messer contributed $5,000 to the non-federal account of the Massachusetts Party and Jeanne Lavine contributed $6,000 to the non-federal account of the Maine Party.

The Brown Committee pursued a national fundraising strategy because the Rhode Island Senate election involved one of the most vulnerable Republican-held seats in 2006, and a significant majority of the Brown Committee's contributions came from out-of-state sources. Declaration of Matthew Brown ¶ 2 ("Brown Dec.").[2] Because two Brown Committee staff employees previously had close working relationships with the Hawaii Party, the Maine Party and the Massachusetts Party, in December 2005 they solicited contributions from those state parties to the Brown Committee. *Id.* ¶ 3.

In early January 2006 (or possibly late December 2005 with respect to Jonathan Lavine) Matthew Brown and Ashley Flanagan, the Brown Committee's National Finance Director, variously requested that Mr. Bready, Mr. Messer and Jonathan Lavine, Jeanne Lavine's husband, make contributions to one or more of these state party committees. *Id.* ¶¶ 4-6. Mr. Brown and Ms. Flanagan did not indicate to Mr. Bready, Mr. Messer or Mr. Lavine that the Brown Committee had solicited contributions from these party committees or that any of those committees had or might contribute to the Brown Committee, nor did they suggest that any of the potential contributors either earmark in any manner any contribution to a state party committee or otherwise seek to influence how any party committee to which he contributed would use his contribution. Nor did Mr. Brown or Ms. Flanagan indicate that any state party committee might use any such contribution for any particular purpose. *Id.* No Brown Committee representative had any contact whatsoever with Ms. Lavine about contributing to a state party committee. *Id.* ¶ 6.[3] Nor did any Brown Committee representative have any such contact with Mr. Connors. *Id.* ¶ 7.

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[2] We are submitting a faxed version of Mr. Brown's declaration and will submit the original upon our receipt of it.

[3] Undersigned counsel has interviewed Ashley Flanagan, the Brown Committee's former National Finance Director, and she has confirmed the substance of all of the statements in Mr. Brown's accompanying declaration concerning her activities and knowledge.

As submissions by other respondents make clear, neither Mr. Bready, Mr. Messer nor Ms. Lavine included any designation, instruction or other writing with their respective contributions to the state party committees, and none of these individuals had any other contact with those committees about their contributions to them.

In March 2006, several speculative newspaper reports appeared that focused, in a manner highly unfavorable to the Brown Committee, on the fact that the three state party committees had contributed to the Brown Committee and that previous contributors to the Brown Committee had also contributed to those party committees. The Brown Committee was then involved in a vigorous and closely contested primary election campaign. Brown Dec. ¶ 8. Almost immediately, the Brown Committee reached a strategic campaign judgment that, although the state party committee contributions that it had received were lawful, the Brown Committee would refund them in order to hasten the end of this story and enable the Committee to refocus the campaign debate on its preferred issue agenda. *Id.* On March 3, the Brown Committee publicly announced that decision and reason, and later that month it refunded the five state party contributions. *Id.* On April 26 Matthew Brown withdrew as a candidate in the Rhode Island Senate race, and the Brown Committee is currently winding up its affairs. *Id.* ¶ 9.

Analysis

1. Every Contribution That May Be at Issue Was Lawful in Source and Amount

Every contribution that may be at issue was made by a lawful source within applicable limits. The federal account of a state party committee may contribute $5,000 per election to the authorized committee of a federal candidate. 2 U.S.C. § 441a(a)(2)(A). An individual may contribute $10,000 per year to the federal account of a state party committee. 2 U.S.C. § 441a(1)(D). And, a federal candidate, and his or her agents, may solicit an individual to contribute up to $10,000 per year to the federal account of a state party committee, and (consistent with state law) up to that amount to a state party's non-federal account. See 2 U.S.C. § 441i(e)(1).[4]

Where every transaction alleged in the complaint is permissible on its face as to source, recipient and amount, a finding of reason-to-believe that one or more violated the Act cannot be predicated on the complainant's speculation and inferences, particularly where the respondents' submissions rebut the elements of the violations alleged. *See* MUR 5406, First General Counsel's Report 7-8 (Jan. 27, 2005); MUR 5304, First General Counsel's Report 8-9 (Jan. 21, 2004).

2. None of the Contributions to the State Party Committees Was Earmarked

The Act includes "earmark[ing]" a contribution as a form of contribution to the intended ultimate recipient:

[4] We note that the non-federal contributions complied with state law: in Maine an individual may contribute an unlimited amount to a state party committee, and in Massachusetts an individual may contribute up to $5,000 per year to a state party committee.

> [F]or purposes of the limitations imposed by [2 U.S.C. § 441a(a)], all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.

2 U.S.C. § 441a(a)(8). In turn, the term "earmarked" means:

> [A] designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

11 C.F.R. § 110.6(b)(1).

The Commission interprets and applies these standards to require "express earmarking," MURs 4831 and 5274, Minutes of an Executive Session, 7, 8 (Sept. 8, 2003). See Statement of Reasons of Vice Chairman Smith and Commissioner Toner at 1 n. 2 (Dec. 1, 2003). As two Commissioners explained, "for a contribution to be 'earmarked' there must be a designation, instruction or encumbrance by *the donor* (the 'person' mentioned in 441a(a)(8)), that results in a contribution being made to the designee." *Id.* at 2 (emphasis in original). "[A] contribution subject to [the Commission's] earmarking rules must *in fact* be earmarked by the person making the contribution." *Id.* at 3 (emphasis in original). While the Commission concluded that contributions to a state party committee (here, the Missouri Democratic State Committee (MDSC)) that "b[ore] explicit indicia of earmarking," such as "memo line annotations" and "letters" specifying a particular federal candidate (here, U.S. Senate candidate Jeremiah Nixon) were earmarked, see *id.*, the Commission declined to so treat other contributions to the MDSC that lacked these indicia, and that instead:

- Were "solicited by the [MDSC], made payable to the party, to assist the party in its efforts on Nixon's behalf," *id.*;
- Given where "the donor believed that by giving to the party he could assist the party's nominees," *id.*;
- Involved "post hoc notations on deposit slips by party staff" that "refer[ed] to Nixon," *id.* at 3, 2; or
- Were linked to "the fact that MDSC used funds in coordinated expenditures on behalf of Nixon in amounts 'corresponding' to the totals raised by Nixon, *id.* at 2 (footnote omitted).[5]

[5] As later summarized (in MUR 5445), the Commission concluded in MURs 4831 and 5274 that the earmarking standard was not satisfied by "contributions [that] showed indirect or implied indicia of earmarking; they were made at a time when the Nixon Campaign... was soliciting earmarked contributions, they were deposited in the [MDSC's] bank account with deposit slips and batch notes (prepared by state committee personnel) containing Nixon

In MUR 5445, the Commission found no reason to believe that there was an earmarking violation where an individual contributed to six non-candidate committees, each of which within nine days contributed to a particular federal candidate to whom the contributor had previously "maxed out," where "none of the contribution checks, deposit slips or other pertinent documents respondents provided include any discernable designation, instruction or encumbrance." First General Counsel's Report 15 (Feb. 2, 2005). Similarly, in MUR 5125, the Commission found no reason-to-believe in part because the complaint contained "bare allegations" but "d[id] not show any designation, instruction or encumbrance on the contribution," and the contribution check itself reflected none. See First General Counsel's Report 9 (Dec. 20, 2002) (footnote omitted). *See also* MUR 5520, First General Counsel's Report 6-7 (May 31, 2005) ("The complaint only alleges implied earmarking and does not provide any information that could substantiate express earmarking.... [I]n light of recent Commission action addressing implied earmarking, the timing and amounts of transfers from the [federal candidate's] committee to the [state party committee] do not provide a sufficient basis to investigate any violations of the Act's earmarking provisions"); MUR 4643, First General Counsel's Report 20-21 (June 29, 1999) (although contributors to a state party committee "could have reasonably expected or believed that their contributions...would be used to benefit [the respondent federal candidate]...there is no indication in the record that any of the contributors directed or controlled their contributions or took any action that might constitute a designation or instruction that the fund be spent on behalf of [the candidate]. Indeed, the available information indicates precisely the opposite.").

The evidence submitted by the respondents in the case at bar demonstrates a complete absence of earmarking on the contributions by Mr. Bready, Mr. Messer and Ms. Lavine, and no other contacts whatsoever between these contributors and the state parties to which they contributed. Nor did any of the contributors receive any indication from any other source as to how their contributions would be used. And, in the absence of any such indicia, the mere fact that the Brown Committee solicited these contributions does not provide reason to believe that they were earmarked for the Brown Committee. *See* MUR 5445, First General Counsel's Report 16 (Feb. 2, 2005) (in MURs 4831 and 5274, contemporaneous explicit solicitations by Nixon campaign for earmarked contributions through MDSC did not provide probable cause to believe that particular contributions to MDSC were earmarked).

3. Section 110.1(h) Precludes None of the Contributions to the State Party Committees

Section 110.1(h) of the Commission's regulations permit a person to contribute to both a candidate and another "political committee which has supported, or anticipates supporting, the same candidate in the same election, so long as" the contributor "does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election," and the contributor "does not retain control over the funds." Just as with the earmarking rules, then, the § 110.1(h) analysis turns on the contributor's knowledge and intent.

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annotations, and a former Nixon staff member left to work for the [MDSC's] coordinated campaign during the relevant period." MUR 5445, First General Counsel's Report 16 (Feb 2, 2005).

In MUR 4538, discussed above, the Commission found no reason-to-believe despite the fact that the solicitation letter could prompt a belief that the contribution to the state party would be used on behalf of a particular candidate. The Commission relied upon the contributor's counsel's statement that the contributor in fact had no knowledge about how the state party actually would use the funds he contributed, the party did not otherwise communicate its plans to the contributor, and the contributor relinquished control of the contribution when he made it. See General Counsel's Report #2 at 17-18 (March 10, 2000).

Even where a contributor knows that the recipient of his contribution would be contributing to a particular candidate, § 110.1(h) applies only where the contributor gives with the knowledge that a "substantial portion" of *his own* contribution would be so used. MUR 5445, First General Counsel's Report 8-9, 11-12 (Feb. 12, 2005); MUR 5019, First General Counsel's Report 27-28 (Feb. 5, 2001). Indeed, enforcing this strict knowledge prerequisite to liability is vital, since a vast amount of federal contributions from particular contributors are made to multiple politically like-minded recipient committees that, in the ordinary course, may be expected to and do contribute to each other as well.

In the case at bar, it is clear that none of the contributors to the state parties had any knowledge whatsoever as to how the state parties would use their contributions, and each relinquished full control over his or her contribution at the moment of the contribution. Accordingly, the Commission should find no reason to believe that § 110.1(h) precluded any of these contributions.

4. The Non-Federal Contributions Could Not Be Earmarked or Subject to § 110.1(h)

As set forth above, the contributions by Mr. Bready and Ms. Lavine to the Maine Party and by Mr. Messer to the Massachusetts Party were made to the recipients' respective *non*-federal accounts. As a matter of law, none of these contributions could be subject to the earmarking proscription, for the Maine and Massachusetts parties indisputably contributed to the Brown Committee from their *federal* accounts. *See generally* MUR 5125, First General Counsel's Report 9-10 (Sept. 16, 2005). Accordingly, the Commission should find no reason-to-believe with respect to these transactions for this reason alone. For the same reason, these non-federal contributions could not be subject to the Commission's 110.1(h) regulation concerning contributions to multiple committees. Under both § 441a(a)(8) and § 110.1(h), then, if there was no actual state party contribution to the Brown Committee from an account that included the individual contributor's funds, there can be no violation.

Conclusion

As demonstrated above and by the submissions of the other respondents, there is no reason to believe that the Brown Committee violated the Act, and the Commission should so conclude and close its file in this case.

We would finally add two points for the Commission's consideration in any exercise of its enforcement discretion in this matter. First, the Brown Committee refunded all five state party contributions during March 2006, well before the complaint was filed, and, in fact, at times

when there was no indication that any complaint would be filed and, indeed, when at least one published report indicated that no complaint would be filed either by the two eventual complainants or by any of Mathew Brown's primary election opponents. See Brown Dec. ¶ 8; Associated Press, "Brown Heads to California to Raise Funds" (March 9, 2006) (reproduced on first page of attachment to the complaint). *See generally* MUR 5304, First General Counsel's Report 11 (Jan. 21, 2004). Second, Mr. Brown is no longer an active candidate and the Brown Committee is winding up its affairs. Under these circumstances, in addition to the persuasive factual and legal reasons set forth above, the Commission should determine that pursuing an investigation of this matter would not be a worthwhile commitment of the Commission's resources.

Thank you for your consideration of this submission.

Yours truly,

Laurence E. Gold

Counsel for Matt Brown for U.S. Senate and James Vincent, as Treasurer

cc: Matthew Brown
James Vincent

BEFORE THE FEDERAL ELECTION COMMISSION

MATTER UNDER REVIEW 5732

DECLARATION OF MATTHEW BROWN

Matthew Brown, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I was an active candidate for the United States Senate in Rhode Island from February 2005 until April 2006. My authorized committee was and is "Matt Brown for U.S. Senate."

2. We sought to create a national profile for my campaign because the Rhode Island Senate race was and remains widely recognized as one of the Democratic Party's best opportunities to capture a Republican-held Senate seat in 2006. To that end, my campaign sought to establish relationships with both donors and Democratic Party activists throughout the Nation. My campaign pursued a national fundraising plan and received a significant majority of our contributions from out-of-state contributors. My own campaign fundraising trips included visits to California, New York, Illinois, Massachusetts and Washington, DC.

3. In December 2005, two of my campaign staff sought to capitalize on their previous close working relationships with the Democratic Party of Hawaii ("Hawaii Party"), the Maine Democratic State Committee ("Maine Party") and the Massachusetts Democratic State Committee ("Massachusetts Party") by soliciting them to contribute to my campaign.

4. In early January 2006 I met with Richard Bready, a longtime friend and supporter. I asked Mr. Bready if he would consider contributing to one or more of these three state parties. I did not indicate that my campaign had solicited contributions from these parties or that any of them might or would contribute to my campaign, nor did I suggest that he earmark in any manner any contribution he might make or otherwise seek to influence how any party committee to which he contributed would use his contribution. Nor did I indicate that any state party committee might use any such contribution for any particular purpose. I did not speak with Mr. Bready again about this matter before he contributed to these state parties. No other representative of my campaign, and nobody else that I know of, discussed contributions by Mr. Bready to state parties with Mr. Bready before he contributed.

5. In early January 2006, I telephoned David Messer, another longtime friend and supporter. I asked Mr. Messer if he would consider contributing to one or more of these three state parties. I did not indicate that my campaign had solicited contributions from these parties or that any of them might or would contribute to my campaign, nor did I suggest that he earmark in any manner any contribution he might make or otherwise seek to influence how any party committees to which he contributed would use his

contribution. Nor did I indicate that any state party committee might use any such contribution for any particular purpose. I did not speak with Mr. Messer again about this matter before he made his contribution. No other representative of my campaign, and nobody else that I am aware of, discussed contributions by Mr. Messer to state parties before he contributed.

6. In late December 2005 or early January 2006 the campaign's National Finance Director, Ashley Flanagan, made a similar inquiry to Jonathan Lavine, another friend and supporter, as to whether he would consider making a contribution to the Massachusetts Party or the Maine Party. Ms. Flanagan subsequently advised me that she contacted Mr. Lavine and that he had declined to contribute, but that he would ask his wife Jeanne, who was also an active donor to Democratic Party candidates and party committees, whether or not she was interested in doing so. To the best of my knowledge, Ms. Flanagan never spoke with Ms. Lavine about contributing to any state party committee, and when she spoke with Mr. Lavine, Ms. Flanagan did not know that other campaign staff had asked any of the state party committees to contribute to my campaign, so Ms. Flanagan could not and did not advise Mr. Lavine that any such contributions might occur; Ms. Flanagan did not suggest to Mr. Lavine that he or Ms. Lavine earmark in any manner any contribution or otherwise seek to influence how any state party to which either contributed would use the contribution; and Ms. Flanagan did not indicate to Mr. Lavine that any state party committee might use any such contribution for any particular purpose. Neither I nor any other representative of my campaign (other than Ms. Flanagan), and nobody else that I am aware of, discussed these potential contributions with Mr. or Ms. Lavine before Ms. Lavine contributed to the Maine Party. I have never met Ms. Lavine.

7. I do not recall ever having met or spoken with John Connors. Nor has any representative of my campaign, and nobody else that I am aware of, ever discussed any matter with Mr. Connors, including any contribution to any state party committee.

8. In early March a series of newspaper articles appeared that focused, in a manner highly unfavorable to my campaign, on the fact that the three state party committees had contributed to my campaign and that previous donors to my campaign had also contributed to those parties. I was then involved in a vigorous and closely contested primary election campaign. I quickly made a strategic campaign decision to refund all of the state party contributions despite my understanding (then and now) that they were lawful. I felt that these refunds were necessary in order to end the adverse publicity as quickly as possible and enable my campaign to refocus the public debate on the policy positions I had been advocating as a candidate. On March 3 I announced that decision and the reason for it. At that time there was no indication that any complaint would be filed about this matter, and at least one subsequent newspaper article reported that no complaint would be filed by either Republican state party committees or other candidates in the Rhode Island Senate race. My campaign refunded all of the state party contributions during March.

9. On April 26 I ended my active candidacy for the United States Senate. The Matt Brown for U.S. Senate committee is now winding up its affairs.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 12, 2006.

Matthew Brown